Supreme Court, U.S.
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NO:

In the Supreme Court of the United States

ROBERT SHAIN and JAMES SHEETZ,

Petitioners,

vs.

ANN M. VENEMAN, Secretary of Department of Agriculture; GILBERT GONZALEZ, JR., Undersecretary of Agriculture for Policy and Planning; and DAVID DOWDY, Rural Development Specialist, in their capacities within the United States Department of Agriculture,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court has said that Article III standing has three essential elements: (1) injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) injury that is fairly traceable to the defendant; and (3) injury that will be redressed by a favorable decision in the instant case. Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). In Lujan, an imminent injury was described as an "elastic concept" and means an injury that is "certainly impending," as opposed to being speculative or hypothetical. Lujan, 504 U.S. at 564, 112 S.Ct. at 2138.

In this case the Plaintiffs own or farm land adjoining or clearly affected by the construction of a municipal waste treatment lagoon constructed in a flood plain and financed by the Defendants. The Eighth Circuit said that because the Plaintiffs could not say exactly when the 100-year flood would occur and damage their property, the injury was not imminent and the Plaintiffs therefore had no standing.

The question presented for review is whether Plaintiffs, who are the very persons a statute is designed to protect and whose interest is going to be injured at some time in the

future through no action of their own, have an imminent injury that confers standing.

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PRIOR OPINIONS IN THE CASE

The following opinions in other Courts in this case are attached and identified as follows:

Appendix A – The Order on Motion to Dismiss from the United States District Court for the Southern District of Iowa, filed August 19, 2003.

Appendix B – The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court's dismissal of Plaintiffs' action, filed July 22, 2004.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the Southern District of Iowa dismissing Plaintiffs' action, was filed on July 22, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS REVIEW

United States Constitution, Article III, Sec. 2, states, in pertinent part:

> The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, . . .; to all Controversies to which the United States shall be a Party; . . . .

42 U.S.C. § 4106(a) provides:

> No federal officer or agency shall approve any financial assistance for acquisition or construction purposes on and after July 1, 1975, for use in any area that has been identified by the Director [of FEMA] as an area having special flood hazards unless the community in which such area is situated is then participating in the national flood insurance program.

STATEMENT OF THE CASE

In August of 1997, the City of Kinross, Iowa, received a letter from the Iowa Department of Natural Resources informing the city of a possible discharge from an individual septic tank for a residence in the city. Kinross is a city of only about 35 residences and no businesses, so it did not have a municipal wastewater treatment facility. The letter

requested a response from the city as to any actions it would be taking to upgrade the existing septic systems in Kinross.

The city then obtained a preliminary engineering report prepared by Veenstra & Kimm, Inc. that "concluded the on-site option would provide treatment at the lowest cost, and that conventional gravity sewer with a controlled discharge lagoon would be a desirable second alternative." In response to that report, the city attempted to obtain funding for a new wastewater system, but those efforts were not successful. Subsequently, the city entered into an agreement with Regional Utility Service Systems (RUSS) to obtain a financing arrangement. The financing obtained through RUSS involved the USDA Rural Development.

RUSS brought the City of Kinross in contact with another engineering firm, Garden and Associates. Garden had apparently had experience manipulating the USDA regarding funding for these types of projects. Ultimately, the Defendants, acting in their capacities within the USDA, did approve funding for the project.

Robert Shain owns farmland near a stream called Smith Creek. This land is about 1,000 feet from the sewage lagoons. The lagoons themselves are constructed in a

floodplain of a tributary to Smith Creek. James Sheetz rents and farms land adjacent to the lagoons on the north, west and south. The tributary flows through the land Mr. Sheetz farms on the western edge of the lagoons. Mr. Sheetz also rents and farms a narrow strip of land between Smith Creek and Mr. Shain's property.

The project engineer for Garden & Associates, who designed the lagoons, incorrectly stated in the construction permit application to the Iowa Department of Natural Resources that the project does not lie in a floodplain.

The City of Kinross does not participate in the federal flood insurance program. As such, the city cannot receive any federal financial assistance for acquisition or construction purposes pursuant to 42 U.S.C. § 4106. Mr. Shain and Mr. Sheetz brought the violation of this statute to the attention of Defendant David Dowdy and the Federal Emergency Management Agency (FEMA) also brought it to Mr. Dowdy's attention. Mr. Dowdy refused to comply with the law and stated that the project was not in a floodplain, contrary to the information given to Mr. Dowdy.

Mr. Shain contacted officials of FEMA, asking that the illegal action of constructing in a floodplain be addressed

by the agency. FEMA has essentially placed the responsibility for the entire matter in the hands of USDA.

The Plaintiffs' property has been flooded in the past, and there is a drainage tile through Mr. Shain's property that drains into Smith Creek.

A federal agency shall not approve any financial assistance for acquisition of construction purposes for use in an area that is in a flood plain. 42 U.S.C. § 4106(a). Pursuant to 7 U.S.C. § 1926(a)(1), the United States Department of Agriculture, represented by the Defendants herein, are authorized to make grants to finance projects for the collection, treatment, or disposal of waste in rural areas. 42 U.S.C. § 4002 requires states or local communities, as a condition of future federal financial assistance, to participate in the flood insurance program administered by the Federal Emergency Management Agency (FEMA). The City of Kinross does not participate in the flood insurance program. Federal regulations say that the determination as to whether an area is a flood plain shall be based on FEMA flood plain maps. 44 C.F.R. § 9.7(c). There is also an Executive Order, No. 11988, that requires federal agencies to consider all possible alternatives to avoid supporting or allowing construction in a floodplain.

Mr. Shain filed a Complaint in the United States District Court for the Southern District of Iowa on December 24, 2002. On April 2, 2003, the Defendants filed a Motion to Dismiss and for Summary Judgment. They alleged that Mr. Shain had no standing to bring this action.

On April 25, 2003, an Amended and Substituted Complaint was filed adding James Sheetz as a Plaintiff in the action. An Amended Motion to Dismiss and for Summary Judgment was filed on May 27, 2003.

A hearing was held on July 29, 2003, before the district court. The City of Kinross, Iowa, had also filed an Amicus Curiae Brief.

On August 19, 2003, the district court entered an Order dismissing the Amended and Substituted Complaint and denying the Motion for Summary Judgment as moot.

A Notice of Appeal was filed on September 10, 2003. On July 22, 2004, the United States Court of Appeals for the Eighth Circuit filed an Opinion affirming the district court. The basis of the court of appeals' decision was that the

Plaintiffs' injury was not imminent because they could not say when the area would flood, only that it would flood.

REASONS FOR GRANTING THIS PETITION

This Court has established jurisprudence regarding the issue of standing, describing the requirements a plaintiff must meet to confer standing. One of these requirements is that the plaintiff's injury must be actual or imminent. However, the exact parameters of the term "imminent" in this context have not really been defined by the Court. This case presents the ideal opportunity for the Court to do so.

I. THE DECISION BELOW CREATES A CONFLICT WITHIN THE CIRCUITS ON THE IMPORTANT ISSUE OF STANDING.

The Plaintiffs' claim in this case is that the sewage lagoons constructed for the City of Kinross were placed in a floodplain, and that the Plaintiffs' property is subject to increased flooding because floodwater will be displaced by the lagoons onto Plaintiffs' property. Because this area is a floodplain, as shown by the FEMA floodplain map, there is no question that it will flood. The only question is when.

That question was the basis of the decision below. The Eighth Circuit held that because a flood may not occur in the 100-year flood plain for many years and because the Plaintiffs could not say when it would occur, the injury was not imminent. But this Court has said that a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." Babbitt v. United Farm Workers, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308 (1979).

The Plaintiffs cited three appellate decisions to the court below, in which the likelihood of natural disasters created standing. First, in Village of Elk Grove Village v. Evans, 997 F.2d 328 (7th Cir. 1993), plaintiffs were concerned that construction of a radio tower on a flood plain would limit a creek's drainage area and increase the risk of flooding (exactly the contention of the Plaintiffs in this case). There was no indication as to when the village would flood, only that it had been subject to flooding in the past, just as Mr. Sheetz described in this case (App. p. 113). In upholding the plaintiffs' standing in that case, the court said:

> The injury is of course probabilistic, but even a small probability of injury is sufficient to create a case or controversy – to take a suit out of the category of the

> hypothetical – provided of course that the relief would, if granted, reduce the probability.

Id. at 329. In other words, a flood plain is going to flood. The only question is when. This holding is in direct conflict with the decision below in this case.

Likewise, in Mountain States Legal Foundation v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996), the court conferred standing because of a slightly increased risk of wildfires occurring in the Kootenai National Forest as a result of a Forest Service logging plan. There was no showing as to when, if ever, such wildfires might occur. This was an even more speculative occurrence than the expectation of a flood in a floodplain. The decision below in this case is also in conflict with the District of Columbia Circuit in Glickman.

Finally, in Central Delta Water Agency v. United States, 306 F.3d 938 (9th Cir. 2002), the plaintiffs sought an order from the court forcing the Bureau of Reclamation to withdraw its decision to release water from a reservoir. In holding that the plaintiffs had standing the court said:

Because they use the water to irrigate their crops, plaintiffs contend that their ability to grow those crops will be severely hampered by the excessively saline water. The injury alleged has not yet occurred; it is threatened. Nevertheless, the possibility of future injury may be sufficient to confer standing on plaintiffs; threatened injury constitutes "injury in fact."

* * * * * * * * * * * *

Applying Laidlaw, Gaston Copper, and Pacific Lumber here, we conclude that the necessary showing for standing purposes is not that the Vernalis standard has already been exceeded, or that plaintiffs' crops have already been damaged by excessively saline water, but that plaintiffs face significant risk that the crops that they have planted will not survive as a result of the Bureau's decisions to discharge water from the New Melones Reservoir during April, May, and October, rather than when needed to meet the Vernalis standard. The threat of injury resulting from the Bureau's employing an operational plan that will likely lead to violations of the Vernalis standard is sufficient to confer standing on plaintiffs. Plaintiffs need not wait to challenge the Bureau's action until

> the Bureau's water management policy results in a violation of the Vernalis standard, and their crops are damaged or destroyed.

Id. at 947-48.

The Central Delta decision makes clear that even though a plaintiff cannot say when an event will occur, he has standing if the event is probable at some time, and the plaintiff is not required to wait until his property is actually damaged before he can legally challenge the defendant's action. This is also in conflict with the decision below.

The decision of the court below attempted to distinguish the foregoing cases from the case under review. With respect to the Elk Grove Village case, the Eighth Circuit noted that the village was subject to periodic flooding. From this the court concluded that the floods in that case were more certain to occur in the near future than in Mr. Shain's and Mr. Sheetz' situation. The court below seemed to think that a 100-year flood plain means that the area floods on schedule every 100 years. But that designation only means that, on the average, a flood may occur every 100 years. As pointed out to the court below at oral argument, Iowa has had 3 100-year floods in the last 11

years. It is also significant, in terms of deciding a motion to dismiss or motion for summary judgment, that Mr. Sheetz stated in an affidavit that this area is subject to periodic flooding. These facts place this case squarely within the facts of the Elk Grove Village case. And the court in the Elk Grove Village case did not mention the history of flooding as the basis for its decision. The significant factor was that the radio tower was being constructed in a floodplain where flooding would certainly occur.

The court below also tried to distinguish the Glickman case and this case. The court's rational in that regard was that in Glickman the Forest Service actions were alleged to be the cause of the increased risk of forest fires. But that does not make the possibility of fires any more likely to occur in the immediate future, if at all. Nor did the court in that case mention this factor in reaching its decision that the plaintiffs had standing. In fact, in can be argued that the certainty of a flood is greater in the case under review here than the possibility of forest fires in the Glickman case.

The court below did not even discuss the Central Delta case.

The effect of the Eighth Circuit decision in this case is to require Mr. Shain and Mr. Sheetz to wait until their property is flooded before they have standing. In other words, they would have to somehow foresee the future and know when a flood was about to happen.

The decision of the Eighth Circuit in this case creates a conflict within the circuits that needs to be resolved by this Court.

II. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION THAT THIS COURT'S PRIOR DECISIONS HAVE NOT CLARIFIED AS TO WHEN AN INJURY IS IMMINENT, AND NOT SPECULATIVE OR HYPOTHETICAL, SO AS TO CONFER STANDING.

The issue of constitutional standing, based on the "case or controversy" requirement of Article III of the Constitution, has long been a subject of opinions of this Court. In more recent years, as litigants have asserted claims based on civil rights, environmental protection, and other interests not historically asserted in the courts, this Court has issued a number of opinions attempting to define the

parameters of the standing doctrine. An examination of some of these cases will bring us to the focus of this Petition.

In Babbitt v. United Farm Workers, 442 U.S. 289, 297-98, 99 S.Ct. 2301, 2308 (1979), this Court discussed the basis for requiring standing as follows:

> We address first the threshold question whether appellees have alleged a case or controversy within the meaning of Art. III of the Constitution or only abstract questions not currently justiciable by a federal court. The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. See, Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." Railway Mail Assn. v. Corsi, 326 U.S. 88, 93 (1945); see, Evers v. Dwyer, 358 U.S. 202, 203 (1958); Maryland Casualty Co. v. Pacific Coal & Oil Co., supra.

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. O'Shea v. Littleton, 414 U.S. 488, 494 (1974). But "[one] does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923); see, Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974); Pierce v. Society of Sisters, 268 U.S. 510, 526 (1925).

What we learn from the Babbitt decision is that standing is required to insure that the parties really do have a definite controversy that will be adequately litigated by those parties. This requirement is assured by denying standing to plaintiffs whose claims are only hypothetical or abstract. We will see from later cases that this distinction between cases that involve "definite and concrete" disputes as opposed to those that are "hypothetical or abstract" should be the focus of standing analysis.

We also learn from the Babbitt decision that a plaintiff does not have to wait until he suffers actual injury before acquiring standing to challenge the contested action

by the defendant. It is the degree of certainty of the injury, not the actual fact of the injury, that confers standing.

Following the Babbitt decision, the issue of standing was addressed by this Court in City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660 (1983). In Lyons the plaintiff had been subjected to a "chokehold" by Los Angeles police officers, and he sought an injunction to prevent a reoccurrance of that activity. This Court denied standing because it was speculative that the plaintiff would even be arrested in the future or that a chokehold would necessarily be used on him. It was also significant that the plaintiff had the power, by not violating the traffic laws, to avoid the conduct he was seeking to enjoin. In fact, one would assume that he would, or should, make every effort to avoid that situation.

The point of the Lyons decision was that the allegation of future injury was hypothetical, depending on the assumption that the plaintiff would again be stopped for a traffic violation and that if so stopped, he would be subjected to a chokehold. These contingencies were too vague and uncertain to confer standing. In the case at issue here, on the other hand, the land owned and occupied by Mr. Shain and Mr. Sheetz, being in a flood plain, will certainly be flooded

in the future, and the construction of the sewage lagoons in the flood plain will certainly increase the extent of the flooding. The only question is when that event will occur. The Lyons decision does not address this issue.

After the Lyons decision this Court issued what has become the polestar of the law of standing, Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992). In Lujan the plaintiffs challenged a decision by the Secretary of the Interior that the Endangered Species Act only applies to federal actions taken in this country. Various members of the plaintiff organization pointed to certain overseas projects funded by U.S. aid that would impact endangered species. The plaintiffs were not challenging a particular project, but rather a challenge to an administrative rule of more general application. But, beyond that, none of the plaintiff's members could say when, or if, they would visit the foreign countries where the endangered species are located. This Court therefore held that the plaintiff did not have standing.

First, this Court enunciated what has become the definitive statement of the elements of standing:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest

> which is (a) concrete and particularized, . . . and (b) "actual and imminent", not 'conjectural' or 'hypothetical,'" . . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id., 504 U.S. at 560-61, 112 S.Ct. at 2136.

This Court then summarized the plaintiff's situation as follows:

> [T]he affiants' profession of an "intent" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough. Such "some day" intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the "actual or

> imminent" injury that our cases require. (emphasis in original).

Lujan, 504 U.S. at 564, 112 S.Ct. at 2138.

The actual substance of the Lujan decision, however, is contained in a footnote, Id., 504 U.S. 564, n. 2, 112 S.Ct. at 2138, where this Court said:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is "certainly impending," . . . [emphasis in original]. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control.

So the Lujan decision did not really define the contours of the concept of imminent or impending injury. All we know is that the facts of that case stretched the concept beyond its purpose. And in describing that purpose to ensure that the alleged injury is not too speculative, this

Court emphasized the "certainty" of the injury rather than its immediacy. That distinction is significant in the case under review here, because the injury to Mr. Shain's and Mr. Sheetz' property is certain; it just cannot be determined with any certainty exactly when the injury will occur. Mr. Shain and Mr. Sheetz certainly have the very interests the statutes, rules and executive order were designed to protect. It they cannot challenge the threatened injury, not one can.

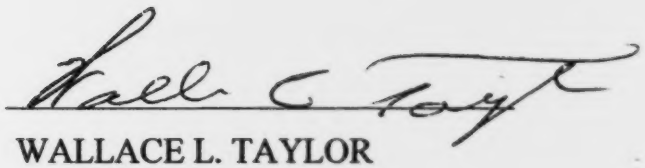
The foregoing analysis presents us with the following current status of the law of standing. To have standing a plaintiff must show that his injury is concrete and particularized and actual and imminent, not conjectural or hypothetical, and that it is caused by the defendant, and that the injury will be redressed by a favorable decision in the case. An injury is imminent if it is "certainly impending." The concept of imminence is the opposite of conjectural or hypothetical. Additionally, this Court has suggested that if a plaintiff can, at least to some extent, determine by his own actions when or if the injury will occur, he is required to be more definite about the imminence of the injury. And finally, a plaintiff does not have to wait until injury actually occurs if its occurrence is "certainly impending."

The case under review here, however, demonstrates that this Court needs to further clarify the concept of imminence. If the controlling factor is the certainty of the injury, as the footnote in Lujan suggests, then Mr. Shain and Mr. Sheetz would have standing. Mr. Shain and Mr. Sheetz certainly have no control over when their injury, i.e., flooding, will occur, as did the plaintiffs in Lyons and Lujan. But they have established that flooding does occur in the area along Smith Creek, including the floodplain where the sewage lagoons were constructed. They should not have to wait until injury actually occurs to challenge the actions of the defendant.

It is clear from the decision of the court below that the federal courts need guidance from this Court that it is the certainty of a threatened injury, not its immediacy, that makes an injury imminent and confers standing.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.



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PROOF OF SERVICE

I hereby certify that on this 15th day of November, 2004, I, the undersigned person, served 3 copies of the Petition in this cause by mailing the same to the following counsel for Respondent:

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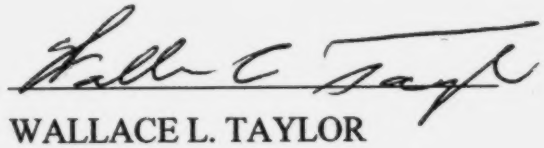
in full compliance with the provision of Rule 29.



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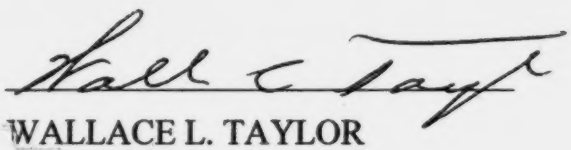
CERTIFICATE OF FILING

I, Wallace L. Taylor, attorney for the Petitioner, hereby certify that I filed 40 copies of the Petition with the Clerk of the Supreme Court of the United States by mailing same by regular mail to 1 First Street N. E., Washington, D. C. 20543, on the 15th day of November, 2004.



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APPENDIX

Appendix A – The Order on Motion to Dismiss from The United States District Court for the Southern District of Iowa, filed August 19, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT SHAIN and JAMES SHEETZ, Plaintiffs, vs. ANN M. VENEMAN in her capacity as Secretary of the United States Department of Agriculture; GILBERT GONZALEZ, JR., and DAVID DOWDY, in their capacities within the United States Department of Agriculture, Defendants.	No. 4:02-cv-4065 ORDER ON DEFENDANT'S MOTION TO DISMISS

Before the Court is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Clerk's No. 3). The Court first addresses the motion to dismiss. Having considered the motion, Plaintiffs' resistance, a corresponding reply, documents related to amicus curiae briefs, and statements of oral argument, the Court grants Defendants' Motion to Dismiss. Accordingly, the Defendants' alternative motion for summary judgment is denied as moot.

I. PROCEDURE

This case arises out of the construction of two sewage lagoon ponds near the City of Kinross, Iowa, which Plaintiffs allege were improperly funded and improvidently located in a 100-year flood plain. Plaintiff Shain first initiated this lawsuit on December 24, 2002, against Ann Veneman, Secretary of Agriculture, and others working in their capacity as employees of the United States Department of Agriculture ("USDA"), all of whom the Court collectively refers to as "the Government".

After an extension of time in which to move or respond to the original Complaint, the Government moved the Court to dismiss the case, or alternatively to grant summary judgment. The essential basis for the motion was the Government's assertion that Plaintiff Shain lacked the necessary standing to bring this suit.

Shain requested and did receive an extension until April 23, 2003, in which to resist the Government's motion. On April 23, 2003, two days past the extended deadline, and despite the directive in Fed. R. Civ. P. 15(a) to seek leave of court before amending a pleading after a responsive pleading

has been filed, Plaintiff Shain filed an Amended Complaint without leave of Court, adding James Sheetz as a Plaintiff and also inserting a new paragraph to seek review of administrative action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).[1]

The Government subsequently amended its initial motion, maintaining Plaintiffs lacked standing to sue, and also argued Plaintiffs could not seek judicial review of agency action since they had not exhausted all administrative remedies. Plaintiffs have filed a resistance to this, citing Darby v. Cisneros, 509 U.S. 137 (1993), and arguing the exhaustion of administrative remedies is not required since Plaintiffs are not program participants of any USDA programs. Plaintiffs reassert their contention that they have standing in this case.

Oral argument on the Government's amended motion was set and then rescheduled for July 29, 2003. A few days before the hearing, the City of Kinross and the Rural Utilities Services Systems ("RUSS") filed a motion seeking leave to file an amicus curiae brief in support of the Government.

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[1] As the Government does not resist the amendment, and amendments are "freely given when justice so requires," the Court has allowed the amendment. Fed R. Civ. P. 15(a).

After the July 29, 2003, oral arguments, the Court left the record open to allow Plaintiffs the ability to respond to the amicus brief filed by Kinross and RUSS.[2] Plaintiffs did respond, arguing that under the Administrative Procedure Act and under Dep't of the Army v. Blue Fox, Inc. 525 U.S. 255 (1999), they are entitled to the full array of equitable remedies. Kinross and RUSS, as well as the Government, have each replied to Plaintiffs' response.

II. MATERIAL FACTS

In August of 1997, Kinross was contacted by the Iowa Department of Natural Resources ("DNR") about complaints the DNR received regarding discharge of wastewater into a creek near Kinross related to a Kinross resident's individual septic tank. Kinross was not given a citation but did begin analyzing the possibility of creating a community sewer system. Originally, funding for this community system was sought through community block grants via the USDA, where the Wapello Rural Water Association would be the

[2] Plaintiffs resisted the motion for leave to file the amicus brief. However, given the obvious interest of Kinross and RUSS and the legal nature of the issue, the Court overruled that resistance.

owner/operator; however, this arrangement proved unsuccessful.

In 2000, Kinross began working with RUSS, an intergovernmental agency, to secure the necessary funding to create a sewer system.[3] Russ obtained funding through the Iowa Department of Economic Development and the USDA. Eventually, RUSS received a loan not to exceed $128,000 and a grant not to exceed $367,500 for the sewer lagoon project. An additional grant of $89,000 from a Community Development Block Grant ("CDBG") was also provided to help fund the sewer lagoon project.

Two sewage retention ponds were built on land adjacent to the City of Kinross. During oral argument, the parties stipulated that construction of both sewage lagoons was complete and the lagoons were operational. The Court notes

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[3] The intergovernmental agreement between RUSS and Kinross allowed RUSS to be the borrower and recipient of the necessary funding for the Kinross sewer. The intergovernmental agreement was made pursuant to Chapter 28E of the Code of Iowa. The Court notes that Chapter 28E of the Iowa Code provides that "[n]o agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law...." See Iowa Code § 28E.7.

that the main impact this case has had on the project thus far relates to the USDA not fully disbursing the loan for the project. While this case has been pending, Kinross obtained private funding to address the expenses related to the sewer lagoon project.

Under 7 U.S.C. § 1926(a)(1), Ann Veneman, as Secretary of the USDA, and those acting under her delegated authority, are authorized to make grants for the financing of projects addressing the collection, treatment, or disposal of waste in rural areas. Pursuant to 42 U.S.C. § 4002, states or local communities, as a condition of future federal financial assistance, must participate in the National Flood Insurance Plan ("NFIP")[4] administered by the Federal Emergency Management Agency ("FEMA"). Under 42 U.S.C. §4106, a federal officer or agency shall not approve financial assistance for acquisition or construction purposes which will be used in any area identified as having special flood hazards unless the community participates in the NFIP. In this case, Plaintiffs allege that by authorizing and approving a loan for the sewage lagoons, the Government violated section 4106. Plaintiffs contend the lagoons were built in a

[4] For further explanation of the NFIP, see Rojek v. FEMA, 234 F. Supp. 2d 999 (S.D. Iowa 2002).

100-year flood plain, and since Kinross does not participate in the NFIP, Kinross was and is ineligible to receive federal financial assistance to construct the sewage lagoons in question. See 42 U.S.C. § 4002 and 42 U.S.C. § 4106.

To avoid "to the extent possible the long and short term adverse impact associated with the occupancy and modification of flood plains and to avoid direct or indirect support of flood plain development wherever there is a practicable alternative," Executive Order 11988 ("Ex. 11988") requires that "[e]ach agency shall provide leadership and shall take action to reduce the risk of flood loss ... in carrying cut its responsibilities for ... (2) providing Federally undertaken, financed, or assisted construction and improvements...." See Ex. 119988 § 1. Section 2 of Ex. 11988 places on each agency the responsibility to evaluate the potential effects of any actions it may take in a flood plain by: (a)(1) determining whether the action proposed will take place in a flood plain before any action is taken ... as determined according to the Department of Housing and Urban Development flood plain map of the area. Ex. 11988, § 2(a)(1). Where an agency determines or proposes to "conduct, support, or allow an action...in a flood plain, the agency shall consider alternatives to avoid adverse effects and incompatible development in the flood plains.: Ex.

11988 § 2(a)(2). In this case, Plaintiffs also allege the Government violated Ex. 11988 by not considering alternative sits and not providing the requisite leadership. Instead, Plaintiffs argue the Government took the word of the Kinross project engineer that the area proposed for the construction of the sewage lagoons was not within a 100-year flood plain before approving and distributing funding for the project.

I. APPLICABLE LAW

Article III of the Constitution restricts "judicial power" to the resolution of "cases" and "controversies". See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982). To ensure a court is passing upon a true case or controversy, "a litigant [must] have standing to challenge the action sought to be adjudicated in the lawsuit." Id. If plaintiffs cannot "demonstrate the requisite case or controversy between themselves and respondents, 'none may seek relief on behalf of himself...." Warth v. Seldin, 422 U.S. 490,502(1975) (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974)).

"In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the

dispute or of particular issues." Id. at 498. "Standing 'involves both constitutional limits on federal-court jurisdiction and prudential limitations on its exercise.'" See Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Warth, 422 U.S. at 498). Both dimensions are concerned with and address "the proper – and properly limited – role of the courts in a democratic society." Warth, 422 U.S. at 498. Whether suing under a particular statute or seeking judicial review under the Administrative Procedure Act, a party must have standing. See Melissa Indus. Dev. Corp. v. North Collin Water Supply Corp., 256 F. Supp. 2d 557, 566 (E.D. Tex 2003) (discussing the requirement that to seek judicial review of agency action under the Administrative Procedure Act, in addition to meeting the constitutional requirement of Article III standing, one must also satisfy prudential standing as well).

Satisfying Article III's case or controversy requirement, the irreducible constitutional minimum of standing requires a plaintiff generally to demonstrate three things. Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1036 (8th Cir. 2002) (citing Bennett, 520 U.S. at 163). A plaintiff must show:

> (1) that the plaintiff ha[s] suffered an "injury in fact" – an invasion of a judicially cognizable interest which is

(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there [is] a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court, and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and the reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth, 422 U.S. at 501.

II. DISCUSSION

Plaintiff James Sheetz rents and farms 90 acres of land just to the north, west, and south of the sewage lagoons. The 100-year flood plain at issue in this case is for a tributary to a creek near Kinross called Smith Creek. The tributary flows

through the land Sheetz rents just south of the lagoons, flowing adjacent to the western edge of the lagoons.

Sheetz is concerned that, were this land to flood, his farm yield would diminish. Sheetz has also used this land to graze cattle and argues he will be harmed if this land floods, because the amount of pasture available for grazing will diminish. Should a flood occur, the harvested stocks from his farming operations could become contaminated with effluent form the lagoons, and he would be unable to graze his cattle there.

Plaintiff Robert Shain has property approximately 1000 feet (as measured by his "pacing off the steps") downstream from the lagoon system property. The primary concern of Shain is related to potential contamination on his property should the area around the sewage lagoons flood.

Plaintiffs identify the "injury in fact" involved in this case as being one of displacement of flood waters. Elaborating, Plaintiffs contend that filling the flood plain would force the water elsewhere, increasing the risk of flooding in an area that previously had a lower risk of flooding. Pointing to Laidlaw, 528 U.S. at 183-84, Plaintiffs argue they have, in similar fashion to the plaintiffs in Laidlaw, articulated

reasonable concerns about being affected by the actions taken by the Government here, which Plaintiffs believe satisfies the "injury in fact" requirement of Article III standing. Plaintiffs aver the area around Smith Creek has flooding in the past even when the lagoons were not there, and their use of the land in close proximity to the lagoons adequately identifies a specific and particularized reasonable concern of an injury they will suffer.

As indicated, Plaintiffs have amended their original Complaint and now seek judicial review of agency action pursuant to the Administrative Procedure Act. The requested relief includes a declaratory judgment that the Government has violated federal law, an injunction requiring the Government to withdraw federal funding for the project, and an injunction order that the lagoons be removed and the land on which they are located be restored.

A. The Constitutional Components of Article III Standing.

Plaintiffs rely exclusively on Laidlaw to support their contention that they have the requisite standing to bring forth this case. Specifically, Plaintiffs have extracted from Laidlaw the sentence, "[i]n contrast, the affidavits and

testimony presented by FOE ["Friends of the Earth"] in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." Laidlaw, 528 U.S. at 183-84. Plaintiffs argue that under Laidlaw, articulating reasonable concerns about a defendant's actions sufficiently alleges an injury in fact, and, here, Plaintiffs assert defendant's actions sufficiently alleges an injury in fact, and, here, Plaintiffs assert proximity to the lagoon site and use of the land adjacent to the lagoons, coupled with the fact that the area has flooded previously even without the existence of the lagoons, sufficiently satisfies the injury in fact prong of standing.

At oral argument, although acknowledging that this case hinges on the determination of the standing issue, Plaintiffs' counsel merely reiterated the position that standing has been established since Plaintiffs use the land surrounding the lagoons and have articulated reasonable concerns about how the Government's activities affect them. Thus, the entirety of Plaintiffs' standing argument consists of their belief that, in Laidlaw, the Supreme Court found that a plaintiff ahs standing if he has a reasonable concern about the effects of a defendant's actions on the plaintiff's interests.

The Court finds the Plaintiffs have failed to demonstrate standing in two respects. First, they have not shown they are at risk of suffering an "actual or imminent" injury. Second, the Court finds that in this case insurmountable problems exist with the redressability prong of standing.

1. **Injury in Fact.**

In this case, the whole basis of Plaintiffs' injury relates to two sewage lagoons having been built in a 100-year flood plain of a tributary to Smith Creek. Plaintiffs' alleged injury might occur if the area is deluged with a 100-year flood. The occurrence of a 100-year flood, by its very nature, however, is speculative and unpredictable. See, e.g., Dilaura v. Power Authority of New York, 654 F. Supp. 641, 647 (W.D.N.Y. 1987) (stating, in the context of denying a preliminary injunction, that "[t]his Court does not question that flooding in the past has inflicted substantial injury to property and that *future flooding at some indeterminate future date* may again cause substantial injury", and going on to classify the risk of future flooding as a "*speculative future injury.*") (emphasis added). The Court finds in this case that Plaintiffs' alleged injury might potentially occur only if and when the area is impacted by a 100-year flood, if that event creates flooding

on the Plaintiffs' property that would not have resulted in the absence of the lagoon structures and/or contamination on the Plaintiffs' property. Thus, Plaintiffs assert an injury related to a future harm, rather than a harm which presently exists. This is a crucial factual distinction from the facts of Laidlaw.

In Laidlaw, Friends of the Earth ("FOE"), an environmental group, sued Laidlaw, a hazardous waste incinerator facility located in South Carolina. See, Laidlaw, 528 U.S. at 175-176. The case concerned the Clean Water Act, and pursuant to the Act, Laidlaw had received a National Pollution Discharge Elimination System ("NPDES") permit. Id. at 174-75. Its NPDES permit allowed Laidlaw to discharge treated water into the North Tyger River. Id. at 176. The permit did, however, place limits on Laidlaw's ability to discharge several pollutants into the river, "including – of particular relevance... mercury, an extremely toxic pollutant." Id Laidlaw consistently failed to meet the discharge limits fixed by its NPDES permit on mercury discharges. Id. The district court found Laidlaw had violated mercury limits on 489 occasions between 1987 and 1995. Id. The Supreme Court, therefore, found the excessive

mercury levels discharged by Laidlaw posed a present or imminent, rather than future, harm to those near the river.[5]

This finding that the river was currently polluted with mercury and thus posed a current, imminent danger was crucial to the court's finding of standing. Viewing the mercury presence in the river as posing an imminent danger meant members of FOE and Citizens Local Environmental Action Network, Inc. ("CLEAN"), who would like to "fish, camp, swim, or picnic in and near the river" but would not because of concern that the water was polluted by Laidlaw's discharges, id at 704, members who would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges, id at 705, members who would like to use "the land surrounding [the River] for recreational purposes [but would not out of concern] that the water contained harmful pollutants, id. or members who complained that property values near Laidlaw facilities were lower than property values located further from Laidlaw facilities, had identified non-speculative injuries sufficient to satisfy standing. By viewing the elevated mercury in the

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[5] The Court notes that in Laidlaw, while the district court found FOE members did have standing, it was "by the very slimmest of margins." Laidlaw, 528 U.S. at 702.

water as creating an imminent danger, the court was able to conclude that "the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected the asserted recreational, aesthetic and economic interests." Id. The Supreme Court was satisfied that FOE and CLEAN members had presented more than "general averments" and "conclusory allegations" and had gone beyond the mere speculation which the Court had previously held was insufficient to show injury in fact. Id. In the present case, however, there is nothing imminent about the Plaintiffs' asserted injury; it will only potentially occur when an unpredictable 100-year flood occurs.

Moreover, in this case, Plaintiffs complain about the Government inaction (of not enforcing various statutes and Ex. 11988) as it relates to others such as Kinross and RUSS. The Supreme Court has been clear that when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992). Clearly, the instant case, concerned with future harm arising from a potential future flood, is unlike Laidlaw, where the court viewed the North Tyger River as posing an imminent danger

as a result of Laidlaw exceeding its NPDES permit for the mercury discharge. The court finds this case more akin to Lujan rather than Laidlaw.

In Lujan, members of the environmental group, Defenders of Wildlife ("DOW"), claimed injury by not being consulted with respect to funding activities the United States government was engaging in abroad. Lujan, 504 U.S. at 562. DOW alleged the funding increased "the rate of extinction of endangered and threatened species." Id. In an attempt to establish the alleged injury, affidavits were introduced indicating DOW members hoped to someday visit impacted areas, as they had previously, but were afraid many animals would likely be extinct by the time they traveled. Id at 563. A theme throughout the affidavits was the fact that the DOW members had no present intentions, or current plans, on traveling to the areas, but rather had intentions on traveling to the areas in question "some day". Id at 564.

The Supreme Court decided "an intent to return to the places... visited before – where [the DOW members] will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough [to show an actual and imminent injury]." Id. The Court determine that these "'some day' intentions – without

any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury." Id. (emphasis in original). In a lengthy footnote, the Supreme Court explained that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretch beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III…" Id. at n.2.

The injury asserted here which is based on the occurrence of a 100-year flood at some unknown point in the future, with particular effects upon the property of the Plaintiffs, is the exact type of "possible future injury [that does not] satisfy the requirements of Art[icle] III." See Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (emphasis added). Just as "allegations of future injury contingent on a plaintiff having an encounter with police wherein police would administer an allegedly illegal 'chokehol[d]'" have been inadequate to demonstrate an imminent injury, see id. (citing Los Angeles v. Lyons, 461 U.S. 95, 105 (1983)), so, too, are allegations of future injury contingent upon the occurrence of a 100-year flood with particular results. The Court finds the injury alleged here is not the type of injury that is "certainly impending" to constitute an actual or imminent injury in fact. Id.

2. Redressability

An aspect of standing that must be met in every case is that "it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 528 U.S. at 181. In this case, Plaintiffs have also failed to establish this aspect of standing. In its pleading papers, the Government argues that, to the extent Plaintiffs have adequately identified an injury in fact, the injury arises from the actions of RUSS and Kinross, rather than the actions of the Defendants in this case. While conceding that this Court is able to enjoin the funding, the Government maintains the Court cannot order the Defendants in this case to dismantle or remove the lagoons.

Plaintiffs cite Dep't of the Army, 535 U.S. 255 (1999), as indicating that under the Administrative Procedure Act, as long as a plaintiff is not seeking money damages, a plaintiff is able to receive very broad specific relief. Under this authority, and under the Administrative Procedure Act itself, which allows a court to hold agency action unlawful and set it aside, Plaintiffs maintain this provides this Court the authority to order the Defendants to dismantle the sewage lagoons. In Dep't of the Army, however, the Supreme Court

actually denied an equitable lien request, finding it was more compensatory and, therefore, sovereign immunity barred the requested remedy. See Dep't of the Army, 525 U.S. at 263-65, suggesting Dep't of the Army does not stand for the position that someone bringing an action under the Administrative Procedure Act "is entitled to the full array of equitable remedies", as Plaintiffs suggest.

Moreover, as the Government has pointed out, a court must limit itself to the consideration of only those possible "remedies aimed at securing prompt compliance with the statute being violated...." See Center for Biological Diversity v. Pirie, Jr., 201 F. Supp. 2d 113, 120 (D.D.C. 2002). Here, Plaintiffs have sued under statutes concerning available funding for communities not participating in the NFIP and under an Executive Order requiring agencies to provide leadership when flood plain construction occurs. Assuming these statutes and the Executive Order have been violated, while the Court believes enjoining the funding would adequately address the violations of improper funding, this would still not redress Plaintiffs' alleged injury. As indicated, during oral argument, the parties stipulated that construction of the lagoons was complete and both lagoons are currently operational. Since the commencement of this case, Kinross has secured private funding for the costs

associated with the lagoons. Merely enjoining the funding of the sewer lagoons does not redress Plaintiffs' alleged injury.

In their pleading papers, Plaintiffs recognize this and argue that no remedy other than removing the lagoons is adequate for the violations of law in this case. However, at oral argument, Plaintiffs virtually conceded that this current lawsuit may not address all of their needs and acknowledged they may need to go elsewhere in order to have the lagoons removed. In any event, the Court does not believe that ordering the destruction of the lagoons would secure "prompt compliance" with Ex. 11988, the Executive Order alleged to have been violated. See Center for Biological Diversity, 201 F. Supp. 2d at 120. In sum, to meet the redressability prong of standing, the law requires "it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Laidlaw, 528 U.S. at 181. Plaintiffs have failed to demonstrate beyond mere speculation that a favorable decision is likely to redress the injury they allege.

III. Conclusion

For the foregoing reasons, the Court finds Plaintiffs lack standing to bring this case. Accordingly, the Defendants'

Motion to Dismiss (Clerk's No. 3) is **granted.**[6] Defendants' Alternative Motion for Summary Judgment is denied as moot. **The case is dismissed.**

IT IS SO ORDERED.

Dated this 19th day of August, 2003.

/S/ James E. Gritzner

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

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[6] Deciding the case on standing grounds means the Court does not further address other arguments related to judicial review under the Administrative Procedure Act, such as what impact, if any, Darby v. Cisneros, 509 U.S. 137, 154 (1993) has on the facts of this case, after the enactment of 7 U.S.C. § 6912(e).

Appendix B – The Opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court's dismissal of Plaintiffs' action, filed July 22, 2004

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 03-3331

Robert Shain; James Sheetz,	*	
Plaintiffs/Appellants,	*	
v.	*	
Ann M. Veneman, Secretary of	*	Appeal from
Department of Agriculture; Gilbert	*	the United
Gonzalez, Jr., Undersecretary of	*	States District
Agriculture for Policy and Planning;	*	Court for the
David Dowdy, Rural Development	*	Southern
Specialist,	*	District of
Defendants/Appellees.	*	Iowa.
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City of Kinross, Iowa; Regional	*	
Utility Service Systems,	*	
Amici on Behalf of	*	
Appellees.	*	

Submitted: April 12, 2004

Filed: July 22, 2004

Before WOLLMAN, HANSEN, and BYE, Circuit Judges.

BYE, Circuit Judge.

Robert Shain and James Sheetz brought this action for declaratory and injunctive relief under the Administrative Procedure Act (APA), alleging the United States Department of Agriculture (USDA) would violate federal law by financing the building of a sewage-treatment plant on a flood plain near the property Mr. Shain owns and land Mr. Sheetz rents and farms outside the city of Kinross, Iowa. The district court[1] granted the government's[2] motion to dismiss for lack of standing and dismissed the government's alternative motion for summary judgment as being moot.

On appeal, the plaintiffs argue the treatment plant increases the risk of flooding on their lands and they therefore possess standing to sue because they face an imminent injury traceable to the government's conduct and redressable by a mandatory injunction to dismantle the plant.

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[1] The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa.

[2] Plaintiffs sued Ann M. Veneman, the Secretary of Agriculture, and others in their capacity as officials in the USDA. For the sake of simplicity, we refer to the defendants collectively as "the government."

We agree with the district court the plaintiffs failed to allege a cognizable injury, and we therefore affirm on that basis without reaching other justiciability issues.

I

In 1997, the City of Kinross had no sanitary sewage treatment system, and sewage water from private septic systems flowed into a common drain that emptied into Smith Creek. After receiving a complaint from the state of Iowa about the discharge from one resident's septic tank, Kinross studied the possibility of building a community sewer system.

In 2000, Kinross and the Regional Utility Service System (RUSS), an intergovernmental agency, entered into an agreement pursuant to Iowa law whereby RUSS agreed to finance, construct, and jointly maintain a $585,000 sewer system serving forty-two users in rural Kinross. To this end, RUSS secured in principle a $128,000 loan and a $367,000 grant from the USDA.[3]

[3] The USDA has yet to disburse the grant. When the plaintiffs filed this lawsuit, the USDA decided to withhold release of the money pending the outcome of the litigation. Kinross and RUSS have filed an amicus brief in which they

On June 19, 2002, Kinross condemned 4.74 acres of land to build two retention ponds, or lagoons, for the treatment facility. The local compensation commission awarded $21,500 in damages to the landowners and $100 to Mr. Sheetz as a tenant. When Mr. Sheetz later unsuccessfully appealed the award in state court, he did not challenge the taking on environmental grounds.

The lagoons were finished and became fully operational in March 2003. They are located on a 100-year flood plain for an unnamed tributary of Smith Creek. The tributary runs through land Mr. Sheetz rents and farms adjacent to the lagoons, and Mr. Shain owns farmland 1,000 feet to one-half mile[4] down stream.

On December 24, 2002, Mr. Shain filed a complaint in federal district court challenging the USDA's funding of the

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explain they completed the project by securing other loans. As a result, the lawsuit has forced Kinross to pass on the costs of interest payments to customers, whose monthly service bills have risen from roughly $24 to $51.

[4] The parties dispute the exact distance separating the lagoons form Mr. Shain's property. The distance is not controlling.

project. Following the government's motion to dismiss for lack of standing, Mr. Shain amended the complaint to include Mr. Sheetz as a plaintiff. On May 27, 2003, the government filed an amended motion to dismiss and for summary judgment, once again contesting the standing to sue.

In their complaint, the plaintiffs allege the USDA would violate federal law by funding the project without requiring Kinross to participate in the National Flood Insurance Plan, as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4106(a), and without considering alternatives to avoid adverse effects and incompatible development in a designated flood plain, as required by Executive Order 11988. The district court dismissed the complaint, concluding the plaintiffs lacked standing because they had alleged a speculative or conjectural injury, or alternatively, because the alleged injury was not redressable by judicial relief. Without reaching other issues (redressability, ripeness), we affirm for the plaintiffs' failure to plead a cognizable injury.

II

The court reviews *de novo* a district court's dismissal for lack of standing, accepting as true all of the complaint's material allegations and construing the complaint in favor of the complaining part. Gardner v. First American Title Ins. Co., 294 F.3d 991, 993 (8th Cir. 2002).

The standing doctrine serves to limit federal jurisdiction to cases and controversies as required by Article III of the United States Constitution. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992). A party invoking federal jurisdiction has the burden of establishing standing, Schanou v. Lancaster County Sch. Dist., 62 F.3d 1040, 1045 (8th Cir. 1995), by alleging and eventually proving he has suffered an injury-in-fact traceable to the defendant's challenged action and redressable by the court's favorable decision.[5] Lujan, 504 U.S. at 560-561.

The district court correctly concluded the complaint in this case failed to allege a cognizable injury-in-fact. For purposes of standing, a plaintiff's injury must consist of an

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[5] A plaintiff may also be denied standing, even if he meets the Article III standing requirements, if he runs afoul of certain judicially-constructed prudential limits on standing. These are not at issue here because the plaintiffs fail to meet even the irreducible constitutional requirements.

invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Id. The district court held the plaintiffs failed to allege even an imminent injury because the occurrence of a 100-year flood is by definition speculative and unpredictable. As a matter of law, we agree.

In the district court, the plaintiff's alleged they faced two imminent injuries in the event of a 100-year flood. First, effluent from the lagoons will spill onto and contaminate the land when a flood exceeds the height of the lagoons' embankments. Second, the embankments will displace flood waters and increase the risk of flooding on their property. Probably because the government presented undisputed evidence a flood could not reach even the base of the embankments, the plaintiffs have apparently abandoned the contamination argument on appeal.

Instead, the plaintiffs advance the displacement argument alone, essentially contending the word "imminent" does not mean immediate but only certain. They reason the 100-year designation means a flood will certainly occur, albeit potentially many years from now. When such a flood occurs, the embankments will surely displace water, leading to an increased risk of flooding on the plaintiffs' lands. We detect

several problems with this argument as a basis for conferring standing.

First, the plaintiffs must establish *they* will suffer the imminent injury. If the possibility of a 100-year flood is remote in the abstract, the possibility the flood will occur while they own or occupy the land becomes a matter of sheer speculation. Indeed, one wonders whether any of the parties (or the court) in this case will be alive the next time a 100-year flood occurs upon the land. Second, the allegations in the complaint strike us as vague and conclusory; they only generally underscored the obvious fact the embankments will displace a certain volume of water. Left to conjecture are the questions whether the marginal rise in the water level will move in the direction of the plaintiffs' land, reach the property and cause cognizable harm which would not have occurred absent the lagoons. Finally, the 100-year label, as a term of art, designates lands most immune from flood damage. If the plaintiffs have alleged a cognizable injury, then as practical matter, any plaintiff who conceivably could be harmed by a defendant's conduct would possess standing to sue in federal court. For these reasons, we conclude the plaintiffs have failed to allege a cognizable injury, and we hold they lack standing to sue the government in this case.

The plaintiffs cite several circuit cases for the proposition that a heightened risk of future harm is cognizable injury. A close reading of these cases, however, reveals the circuits have recognized only an increase in risk sufficient to take the probability of harm out of the realm of the hypothetical and speculative. To illustrate, we will examine the two cases that most strongly support the plaintiffs' argument.

In Village of Elk Grove Village v. Evans, 997 F.2d 328 (7th Cir. 1993), the plaintiffs were concerned the erection of a radio tower on a flood plain would limit the creek's drainage area and increase the risk of flooding. The court held the plaintiffs possessed standing to sue, declaring in dicta "even a small probability of injury is sufficient to create a case or controversy, to take a suit out of the category of the hypothetical...." Id. at 329.

In our mind, Elk Grove is easily distinguishable from this case. There, the flood plain was a *common* flood area, which continually imposed sandbagging and other flood-control costs on the Village of Elk Grove. Thus, the Village had a direct stake in ensuring the defendant's conduct did not aggravate a known and predictable danger, even if the marginal increase in risk defied calculation. Here, in contrast, the danger of the flood itself is remote and

improbable. To whatever extent the lagoons increase the theoretical risk of flooding on the plaintiffs' property, they will do so only if the remote risk of a 100-year flood first materialized while the plaintiffs have a property interest in the land.

In Mountain States Legal Found. v. Glickman, 92 F.3d 1228 (D.C. Cir 1996), the court conferred standing on the plaintiffs who challenged the Forest Service's plan to prohibit logging on a national forest. The plaintiffs established the plan would increase the likelihood of a catastrophic fire by permitting fuel to accumulate in dead trees. Id. at 1234-35. The analogy between Glickman and the instant case, of course, is flawed. There, the defendant's conduct directly and measurable increased the chances a fire would start; the defendant's conduct was not merely an intervening factor that could aggravate an independently occurring natural disaster. For this case to become truly analogous to Glickman, the lagoons would have to increase the probability of a 100-year flood itself.

We conclude the jurisprudence of our sister circuits is consistent with our holding in this case.

III

For the forgoing reasons, we affirm the district court's dismissal of the plaintiffs' complaint for lack of standing.